



2. Background

2.1 Introduction

The first chapter of this *Draft Environmental Impact Statement on the Policy for Sustainable Forests* describes the background and purpose of updating the *Forest Resource Plan* for forested state trust lands managed by the Washington State Department of Natural Resources (the department).

Included in this chapter are:

- The origin and purposes of trust lands in Washington State and the trust mandate;
- An overview of the department and the Board of Natural Resources; and
- The legal and regulatory framework of managing trust lands.

2.2 Washington's Trust Lands and Mandate

The department manages approximately 5 million acres of uplands and aquatic lands. Approximately 2.1 million acres are forested state trust lands, which are the subject of the *Policy for Sustainable Forests*. These lands are held in trust for the benefit of specific trust beneficiaries. The fiduciary aspect of trust management requires the department to manage these lands in a manner that produces long-term sustainable income for the beneficiaries. In doing so, the department complies with all state and federal laws and agreements. The department also complies with policies set by the Board of Natural Resources, the policy-making body for state trust lands.

The department manages primarily two categories of forested state trust lands: Federal Grant Lands and State Forest Lands. These lands have separate origins that are reflected in both the nature of the lands and how they are managed.

2.2.1 Federal Grant Lands

Just prior to Washington becoming a state in 1889, Congress passed the Omnibus Enabling Act of 1889 and granted more than 3 million acres of land to support various public institutions important for the new state. This act set aside two square miles of every 36 to produce financial support for the common schools. Also, the act granted

additional lands to other public institutions. These lands are known as Federal Grant Lands and consist of eight specific trusts:

- Common school lands, which support the construction of public schools;
- Agricultural school lands, which support the Washington State University in Pullman;
- Charitable, educational, penal and reformatory institutions lands, which support those public institutions;
- University original lands, which were used to support the University of Washington in Seattle (only a small amount of that acreage still remains);
- University transfer lands, which were originally part of the charitable, educational, penal and reformatory institutions lands trust, but were transferred by the state Legislature to provide additional support to the University of Washington;
- Normal school lands, which currently support four universities (Western Washington University in Bellingham; Central Washington University in Ellensburg; Eastern Washington University in Cheney; and The Evergreen State College in Olympia);
- Scientific school lands, which support the Washington State University in Pullman; and
- Capitol building lands, which support the construction of state office buildings on the Capitol Campus in Olympia.

Of the original Federal Grant Lands, approximately 1.463 million acres of forest lands remain and are the subject of the *Policy for Sustainable Forests*. Direction for management of these lands is specified in the Omnibus Enabling Act and the Washington State Constitution further limits and directs the sale, lease and management of Federal Grant Lands.

2.2.2 State Forest Lands

The department manages two categories of State Forest Lands: State Forest Transfer Lands and State Forest Purchase Lands. These were formerly known as State Forest Board Transfer Lands and State Forest Board Purchase Lands, respectively.

STATE FOREST TRANSFER LANDS

Most of the State Forest Lands are State Forest Transfer Lands. They total approximately 626,000 acres, or about 30 percent of the 2.1 million acres of forested state trust lands managed by the department.

State Forest Transfer Lands were acquired from 21 counties in the 1920s and 1930s through tax foreclosures. Later, pursuant to state law, most of these lands were transferred to the state of Washington. Many of these lands had been harvested. These lands were ultimately deeded to the state as State Forest Transfer Lands and placed in trust status. In exchange for the deed transfer, the county and junior taxing districts in

which the land is located are given a portion of the revenue from timber sales and other activities on these lands. In addition, a significant portion of the total revenue goes to support public schools, since the revenue is distributed based on local tax millage. The portion going to schools offsets State-General Fund support.

Because the state is both the grantor and trustee, the state has considerable flexibility to change the terms of the trusts through statutory direction. The Legislature has directed that the State Forest Transfer Lands be managed in the same way and for the same purposes as the Federal Granted Lands.

STATE FOREST PURCHASE LANDS

Nearly 80,000 acres of State Forest Lands are State Forest Purchase Lands. These lands were either purchased by the state or acquired as a gift by the state. The State Forest Purchase Lands were acquired under the 1923 Reforestation Act, which gave the State Forest Board the power to acquire any lands that were chiefly valuable for developing and growing timber and to designate these lands as State Forest Lands. All State Forest Purchase Lands were to be used primarily for forestry, forever reserved from sale. However, the timber could be sold and lands leased in the same way and for the same purposes as the State Federal Grant Lands.

COMMUNITY COLLEGE FOREST RESERVE

In addition to Federal Grant and State Forest Lands, the department also manages 3,223 acres of forest lands for community colleges. The Community College Forest Reserve was established by the state Legislature in 1990. Monies for the department to purchase the properties were appropriated that year.

These lands, located near urban areas, form a buffer between working forests and suburban uses. The properties are managed for sustained timber production, but special consideration is given to aesthetics, watershed protection and wildlife habitat. Revenues go in a special fund for building and capital improvements on community college campuses. These lands are also addressed by the *Policy for Sustainable Forests*.

KING COUNTY WATER POLLUTION CONTROL DIVISION

The department manages 4,336 acres as state forest land for the benefit of King County's Water Pollution Control Division. These lands were transferred to the department for management by an agreement made with King County in June 1995.

2.2.3 Trust Mandate and Responsibilities

A trust is a relationship in which one person, the trustee, holds title to property that must be kept or used for the benefit of another (Bogert, 1987). The relationship between the trustee and the beneficiary for these lands is a fiduciary relationship. A trust includes a grantor (the entity establishing the trust), a trustee (the entity holding the title), one or more beneficiaries (entities receiving the benefits from the assets) and trust assets (the property kept or used for the benefit of the beneficiaries). In the case of Washington's trust responsibility, the trust assets consist of the trust lands, funds in certain dedicated accounts and the permanent funds associated with certain trusts.

With the state as trustee, the Legislature has designated the department as manager of the Federal Grant Lands and State Forest Lands. The Board of Natural Resources is required by statute to establish policies to ensure sound management of trust lands.

In addition to complying with laws of general applicability, as a trust manager the department follows the common law duties of a trustee. These include, but are not limited to: administering the trust in accordance with the provisions that created it; maintaining undivided loyalty to each of the trusts and its beneficiaries; managing trust assets prudently; making the trust property productive, while recognizing the perpetual nature of the trusts; dealing impartially with beneficiaries; and reducing the risk of loss to the trusts.

The department must also comply with laws of general applicability. In 1984, the Washington State Supreme Court specifically addressed the state trust relationship in County of Skamania v. State of Washington, 102 Wn.2d 127, 685 P.2d 576. The Skamania decision explicitly addressed two of the trustee's duties. The Supreme Court found that a trustee must act with undivided loyalty to the trust beneficiaries to the exclusion of all other interests and to manage trust assets prudently. The court also cited a series of cases in which private trust principles were applied to land grant trusts. While all but one of these cases are from other states with differently worded enabling acts, they generally indicate that a state's duty is to strive to obtain the most substantial financial support possible from the trust property, while exercising ordinary prudence and taking necessary precautions for the preservation of the trust estate.

In the department's view, prudent management means, among other things, avoiding undue risk. The department believes it is in the best interest of the trust beneficiaries over the long-term to manage forested state trust lands to: prevent losses of ecological function, which may cause the listing of additional species as threatened or endangered; avoid circumstances likely to lead to public demand for ever-increasing, restrictive regulations of forest practices; and avoid the resulting contract disputes, uncertainty and loss of the ability to manage trust lands for their primary purpose.

That is why the department has in certain policies retained the freedom to exceed existing state Forest Practices Rules (Title 222 WAC) when necessary to protect resources on forested state trust lands.

In summary, any management action taken on Washington's state trust lands should be consistent with the principles of trust management. It is important to retain the long-term capacity of the forest, recognizing that near-term actions can create long-term economic, ecological and social benefits. The legal construction of Washington's trust lands create major differences in how these lands are managed when compared to other public lands and private fiduciary trusts.

2.3 Department of Natural Resources

2.3.1 The Department

The department was established in 1957 with the consolidation of several state agencies, boards and commissions to serve, in part, as the manager of state trust lands. In addition to forested state trust lands, the department manages agricultural and aquatic lands; natural areas and commercial real estate. It also administers several regulatory programs and acts as the state's principle wildfire control agency.

The department manages state trust lands primarily to provide substantial revenue to specific public beneficiaries to benefit the people of Washington. Such lands provide needed revenue to Washington's public schools, universities, prisons, state office buildings, hospitals, fire departments and other public services in many counties. Significantly, they also provide jobs, commodities, clean water, wildlife habitat and increasingly scarce recreational opportunities. The department manages trust lands to provide these additional benefits while maintaining the primary goal of trust revenue production.

As steward of these lands and natural resources, the department relies on a diverse staff of foresters, engineers, geologists, biologists, cartographers, hydrologists, soil scientists, economists and others who protect and manage lands for long-term productivity and revenue, as well as habitat and other conservation, education and recreation benefits.

2.3.2 Board of Natural Resources

As part of creating the department, the Legislature also created the Board of Natural Resources. Part of the Board of Natural Resources' charge is to approve major policies for state trust lands, including all forested state trust lands and resources for which the *Policy for Sustainable Forests* is being developed.

The Board of Natural Resources is comprised of six members: the Commissioner of Public Lands; the Governor (or a designated representative); the State Superintendent of Public Instruction; the Dean of the College of Agricultural, Human and Natural Resource Sciences, Washington State University; the Dean of the College of Forest Resources, University of Washington; and an elected representative from a county that contains State Forest Lands.

2.4 Legal and Regulatory Framework

The state and federal laws and rules referenced in this *Draft Environmental Impact Statement on the Policy for Sustainable Forests* are summarized in this section. The relationship of each law or rule to the department's policy decisions is explained within each policy subject area in Chapter 3.

In addition, the department entered into a legal/contractual obligation with the United States Fish and Wildlife Service and National Oceanic and Atmospheric Administration-

Fisheries when the *Habitat Conservation Plan* was adopted in 1997. This agreement applies to 1.6 million acres of forested state trust lands and is discussed further in the section on the Endangered Species Act.

2.4.1 State Laws

Washington state laws are categorized in the Revised Code of Washington (RCW). Corresponding state rules that provide more details about implementing the laws are categorized in the Washington Administrative Code (WAC).

PUBLIC LANDS ACT (TITLE 79 RCW)

The Public Lands Act is one of the laws by which the department manages all of its lands. The land management authorities and policies contained in it define both “multiple use” and “sustainable harvest,” which are key concepts applicable to the *Policy for Sustainable Forests*.

MULTIPLE USE CONCEPT (RCW 79.10.120)

The Legislature has directed the department to utilize a “multiple use concept” in the administration of public lands. The uses allowed under this concept must be in the best interests of the state and the general welfare of the citizens, as well as consistent with the trust provisions of the various lands involved.

Utilizing the multiple use concept means the department will manage trust lands to provide for other public uses when those uses are compatible with the obligations of trust management. Public uses that may be compatible with trust management activities include: recreational areas; recreational trails for both vehicular and non-vehicular uses; special educational or scientific studies; experimental programs managed by various public agencies; special events; hunting, fishing and other sports activities; maintenance of scenic areas; maintenance of historical sites; municipal or other public watershed protection; greenbelt areas; and public rights of way. If such additional uses are not compatible with the fiduciary obligations in the management of trust land, they may be permitted only if there is compensation to satisfy the trust’s financial obligations.

SUSTAINABLE HARVEST PROGRAM (RCW 79.10.300)

The department manages the forested state trust lands on a sustained yield basis. The department is required to periodically adjust the acreages designated for inclusion in the sustained yield management program and calculate a sustainable harvest level.

Sustainable harvest level is defined in the law as the volume of timber scheduled for sale from state-owned lands during a planning decade, as calculated by the department and approved by the Board of Natural Resources.

In September 2004, the Board of Natural Resources met the requirements of this law by adopting a revised sustainable harvest calculation.

FOREST PRACTICES ACT (TITLE 76.09 RCW)

The purpose of Washington's Forest Practices Act is to protect the state's public resources while maintaining a viable timber industry. The act regulates activities related to growing and harvesting timber on all non-federal forest lands in the state, including department-managed forested state trust lands. The Forest Practices Board was established and mandated to adopt the state Forest Practices Rules (Title 222 WAC) that govern how the Forest Practices Act must be implemented. Both the act and the rules have been amended over time to address evolving protection of public resources.

In 1999, the Washington Legislature authorized the Forest Practices Board to adopt new rules consistent with the *Forests and Fish Report*, an agreement that addressed protection of aquatic resources (RCW 76.09.055). In response, the Forest Practices Board amended the state Forest Practices Rules in July 2001. The objectives of the new rules are to further protect public resources by focusing on water quality, salmon habitat and other aquatic and riparian resources.

The department's Forest Practices Program administers and enforces the state Forest Practices Act and its rules. It operates independently of the department's state land management programs. Management activities on forested state trust lands are subject to the state Forest Practices Rules, as are forest management activities on non-federal public and private forest lands.

STATE ENVIRONMENTAL POLICY ACT (TITLE 43.21C RCW)

The State Environmental Policy Act (SEPA) requires state agencies to review proposed actions for probable significant adverse impacts and, when necessary, to prepare an environmental impact statement for actions that may have a probable, significant adverse impact on the environment. Compliance with SEPA ensures timely analysis, public comment processes and mitigation of the probable significant environmental impacts during various activities, including project planning and implementation, as well as during programmatic or policy-level planning efforts.

The SEPA Rules (chapter 197-11 WAC) provide more details for implementing this law. They also establish uniform environmental review requirements for all agencies.

Most department activities related to forest management, i.e., planning, road development, harvesting, silvicultural activities, etc., are subject to SEPA. Similar activities by private landowners are not subject to SEPA.

GROWTH MANAGEMENT ACT (TITLE 36.70A RCW)

The Growth Management Act requires local governments to establish comprehensive growth management plans that address a range of natural resource issues, including timber and other resources that may be on forested state trust lands.

The department works with local governments as they develop land use plans and regulations. In some cases, forested state trust lands that lie in zones identified for development will be converted to other uses or transferred out of trust status, with

compensation to the trust(s), when it best serves the trust(s) interests. In other cases, the department identifies forested state trust lands that should be protected from development when it is in the trust(s) best interests.

OTHER STATE LAWS

HYDRAULICS PROJECT APPROVAL (RCW 77.55.100)

Hydraulics Project Approval is required from the Washington State Department of Fish and Wildlife if proposed management activities on forested state trust lands would use or change the natural flow or bed of any state water.

SURFACE MINING ACT (TITLE 78.44 RCW)

The Surface Mining Act requires anyone who engages in surface mining activities, as defined by the act, to obtain a permit from the department. The law applies equally to any mining activities that may occur on forested state trust lands.

THE SHORELINES MANAGEMENT ACT (TITLE 90.58 RCW)

The Shorelines Management Act requires the Washington State Department of Ecology and local governments to manage shorelines by planning for and fostering all reasonable and appropriate uses. When the department conducts a management activity on forested state trust lands which falls within the purview of this law, the department must obtain a permit from the appropriate local government.

THE STATE WATER POLLUTION CONTROL ACT (TITLE 90.48 RCW)

The Water Pollution Control Act requires that the state of Washington maintain the highest possible standards to ensure the purity of all waters of the state, consistent with public health and public enjoyment; the propagation and protection of wildlife, birds, game, fish and other aquatic life; and the industrial development of the state. It also requires the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the state's waters.

2.4.2 Federal Laws

ENDANGERED SPECIES ACT (16 U.S.C. 1531 ET SEQ.)

The Endangered Species Act protects federally listed species and their ecosystems. Section 10 of the Endangered Species Act (16 U.S.C. 1539) authorizes a landowner to negotiate a habitat conservation plan with the United States Secretary of the Interior to minimize and mitigate any incidental impact to threatened and endangered species while conducting lawful activities such as forest practices. A habitat conservation plan may allow the landowner to develop habitat for endangered species at a landscape level, rather than protecting the individual sites at which the species is found on the landowner's property. As long as the landowner manages under the terms and conditions of the habitat conservation plan, the landowner will not be prosecuted for "take" of an individual animal. The permit issued to the landowner by the federal government is referred to as an

“Incidental Take Permit,” and identifies the range of activities allowed under each habitat conservation plan.

In 1997, the department and the United States Fish and Wildlife Service and the National Oceanic and Atmospheric Administration-Fisheries (collectively referred to as “the Federal Services”) signed a multi-species *Habitat Conservation Plan* to address the department’s compliance with the federal Endangered Species Act in its management of forested state trust lands.

The department’s *Habitat Conservation Plan* covers approximately 1.6 million acres of forested state trust lands within the range of the northern spotted owl and is a multi-species land management plan that takes a landscape approach to managing for conservation of threatened and endangered species. The plan protects all currently listed and potentially listed species and manages for species populations, which in turn protects individual animals. Because many of the department’s forested state trust lands are adjacent to federal lands, the *Habitat Conservation Plan* is designed to supplement federal land management protection measures at a landscape level, as described in the *Northwest Forest Plan*.

THE FEDERAL WATER POLLUTION CONTROL ACT (CLEAN WATER ACT) (33 U.S.C. 1251 ET. SEQ.)

The Clean Water Act relates to protecting water quality. Washington’s Forest Practices Rules are constructed so that meeting the requirements of the rules also meets the requirements of state law, as well as this federal law.

2.4.3 Relationship to 2004 Sustainable Harvest Calculation

In 2004, the department recalculated the sustainable forest management harvest levels in Western Washington. The process included extensive public involvement, the services of the Sustainable Harvest Calculation Technical Review Committee and sophisticated computer simulations. It was supported by the *Final Environmental Impact Statement on Alternatives for Sustainable Forest Management of State Trust Lands in Western Washington*. The computer simulations were used to understand how different policies may change forests over time and space. They also showed how forest ecology and forest revenues would change for the analyzed alternatives.

The policies amended through the *Final Environmental Impact Statement on Alternatives for Sustainable Forest Management of State Trust Lands in Western Washington* that have already been analyzed and adopted by the Board of Natural Resources as part of that process will be included in the *Policy for Sustainable Forests* (see Appendix A).

